

**Introduced by Senator Battin**

December 13, 2004

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An act to amend Sections 285, 288.1, 1000.12 and 1203.006 of, and to repeal Section 1000.13 of, the Penal Code, relating to sexual abuse.

LEGISLATIVE COUNSEL'S DIGEST

SB 33, as introduced, Battin. Child sexual abuse.

Existing law provides that it is a crime punishable by imprisonment in the state prison for persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void to commit fornication or adultery with one another.

This bill would provide that it is a crime punishable by imprisonment in the state prison for persons within specified degrees of consanguinity who are 18 years of age or older to commit fornication or adultery with one another.

Existing law provides that, in lieu of prosecuting a person suspected of committing an act of abuse or neglect involving a minor victim, the prosecuting attorney may refer that person for counseling and psychological treatment.

This bill would specify that these provisions only apply to a person suspected of committing physical abuse or neglect.

Existing law also provides that, in lieu of trial, the prosecuting attorney may make a motion to defer entry of judgment with respect to any crime charged in which a minor is a victim of an act of molestation or sexual abuse, upon written agreement between the prosecuting attorney and the suspect, if he or she is a family member of the victim, the person has no prior violent or sexual felony convictions, and no adverse diversion or counseling history, as specified, provided that rehabilitation is feasible, there is no threat of harm to the minor, the charged offense is not a lewd or lascivious act

or any other sexual offense committed by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury, the defendant pleads guilty and completes an approved treatment program, 5 years after which, the court shall dismiss the charges against the defendant.

This bill would repeal these provisions.

Existing law provides that a person who is convicted of committing lewd and lascivious acts upon a child or engaging in continuous sexual abuse of a child, if the violation involved more than one victim, substantial sexual conduct with a victim who was under 14 years of age, or the use of obscene matter depicting sexual conduct, as specified, shall be ineligible for probation, a suspended sentence, nor shall any of the charges against him or her be dismissed, as specified, unless the court makes several findings including that the defendant is the victim's parent or relative, grant of probation is in the best interest of the child, rehabilitation of the defendant is feasible, and there is no threat of physical harm to the child.

This bill would instead provide that probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for any person convicted of committing lewd and lascivious acts upon a child or engaging in continuous sexual abuse of a child unless the person is not ineligible under other provisions, the grant of probation is in the best interest of the child, rehabilitation of the defendant is feasible, and there is no threat of physical harm to the child.

This bill would make other conforming changes.

Because this bill would increase local incarceration costs and change the punishment for a crime, it would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

SECTION 1. Section 285 of the Penal Code is amended to read:

285. Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who *being 18 years of age or older*, commit fornication or adultery with each other, are punishable by imprisonment in the state prison.

SEC. 2. Section 288.1 of the Penal Code is amended to read:

288.1. Any person convicted of committing any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years shall not have his or her sentence suspended until the court obtains a report from a reputable psychiatrist, from a reputable psychologist who meets the standards set forth in Section 1027, or from a recognized treatment program pursuant to Section 1000.12 or 1203.066, as to the mental condition of that person.

SEC. 3. Section 1000.12 of the Penal Code is amended to read:

1000.12. (a) It is the intent of the Legislature that nothing in this chapter deprive a prosecuting attorney of the ability to prosecute any person who is suspected of committing any crime in which a minor is a victim of an act of ~~molestation~~, *physical* abuse; or neglect to the fullest extent of the law, if the prosecuting attorney so chooses.

(b) ~~Except as provided in subdivision (c), in~~ *In lieu of* prosecuting a person suspected of committing any crime, involving a minor victim, of an act of *physical* abuse or neglect, the prosecuting attorney may refer that person to the county department in charge of public social services or the probation department for counseling or psychological treatment and such other services as the department deems necessary. The prosecuting attorney shall seek the advice of the county department in charge of public social services or the probation department in determining whether or not to make the referral.

~~(c) (1) In lieu of trial, the prosecuting attorney may make a motion to the trial court to defer entry of judgment with respect to any crime charged in which a minor is a victim of an act of~~

1 ~~molestation or sexual abuse, provided that the defendant pleads~~  
2 ~~guilty to all crimes and enhancements charged. Upon that motion~~  
3 ~~and defendant's plea of guilty to all charges and enhancements;~~  
4 ~~the court may defer entry of judgment, contingent upon the~~  
5 ~~defendant's referral to, and completion of, a treatment program~~  
6 ~~approved by the prosecuting attorney. Upon the defendant's~~  
7 ~~successful completion of the treatment program, and upon the~~  
8 ~~positive recommendation of the treatment program authority and~~  
9 ~~the motion of the prosecuting attorney, but no sooner than five~~  
10 ~~years from the date of the defendant's referral to the treatment~~  
11 ~~program, the court shall dismiss the charge or charges against the~~  
12 ~~defendant.~~

13 ~~(2) Upon any failure of treatment under the program described~~  
14 ~~in paragraph (1), the prosecuting attorney may make a motion to~~  
15 ~~the court for entry of judgment and the court shall, upon a finding~~  
16 ~~of failure of treatment based on a preponderance of evidence,~~  
17 ~~enter judgment upon the defendant's pleas and admissions, and~~  
18 ~~schedule a sentencing hearing as otherwise provided in this code.~~

19 ~~(3) The office of the prosecuting attorney shall promulgate~~  
20 ~~eligibility standards for deferred entry of judgment and treatment~~  
21 ~~of defendants described in paragraph (1), which shall include, but~~  
22 ~~not be limited to, all of the following:~~

23 ~~(A) Deferred entry of judgment for the defendant is in the best~~  
24 ~~interests of the minor victim.~~

25 ~~(B) Rehabilitation of the defendant is feasible in a recognized~~  
26 ~~treatment program, as defined in Section 1203.066, designed to~~  
27 ~~deal with child molestation, abuse, or neglect, as specifically~~  
28 ~~related to the charges made.~~

29 ~~(C) There is no threat of harm to the minor victim if entry of~~  
30 ~~judgment is deferred.~~

31 ~~(D) No person shall be deemed eligible for deferred entry of~~  
32 ~~judgment under this section unless he or she pleads guilty to all~~  
33 ~~charges and enhancements.~~

34 ~~(E) Deferred entry of judgment shall not apply to any person~~  
35 ~~who is charged under subdivision (b) of Section 288, or any~~  
36 ~~sexual offense involving force, violence, duress, menace, or fear~~  
37 ~~of immediate and unlawful bodily injury on the minor victim or~~  
38 ~~another person.~~

1 ~~(F) Any person who applies for deferred entry of judgment~~  
2 ~~under this section shall also meet all of the requirements for the~~  
3 ~~counseling program delineated under Section 1000.13.~~

4 ~~(4) Deferred entry of judgment shall be granted upon the~~  
5 ~~following terms:~~

6 ~~(A) Defendant shall seek and participate in a rehabilitation~~  
7 ~~program as prescribed by the district attorney.~~

8 ~~(B) Defendant shall not use, handle, or have in his or her~~  
9 ~~possession marijuana, narcotics, dangerous drugs, or controlled~~  
10 ~~substances of any kind, unless lawfully prescribed for the~~  
11 ~~defendant by a licensed physician.~~

12 ~~(C) Defendant shall not associate with known or reputed users~~  
13 ~~or sellers of marijuana, dangerous drugs, or narcotics, or be in~~  
14 ~~places where narcotics or dangerous drugs are present.~~

15 ~~(D) Defendant shall submit his or her person, property,~~  
16 ~~automobile, and any object under his or her control to search and~~  
17 ~~seizure in or out of the presence of the defendant, by any law~~  
18 ~~enforcement officer or probation officer.~~

19 ~~(E) Unification with the family or unsupervised contact with~~  
20 ~~the minor victim or any other minor shall be prohibited except~~  
21 ~~upon recommendation of the treatment program and motion of~~  
22 ~~the district attorney and order of the court.~~

23 ~~(F) Any violation of the law constitutes a failure of treatment.~~

24 ~~(c) This section shall not apply to any person who is charged~~  
25 ~~with sexual abuse or molestation of a minor victim, or any sexual~~  
26 ~~offense involving force, violence, duress, menace, or fear of~~  
27 ~~immediate and unlawful bodily injury on the minor victim or~~  
28 ~~another person.~~

29 SEC. 4. Section 1000.13 of the Penal Code is repealed.

30 ~~1000.13. (a) Notwithstanding Section 1000.12, no person~~  
31 ~~suspected of violating any section of this code in which a minor~~  
32 ~~is a victim of sexual abuse shall be referred for counseling in lieu~~  
33 ~~of prosecution except upon written agreement between the~~  
34 ~~prosecuting attorney and the suspected person and unless all of~~  
35 ~~the following apply to the suspected person:~~

36 ~~(1) The person is a family member of the victim. For the~~  
37 ~~purposes of this chapter “family member” means a parent,~~  
38 ~~stepparent, sibling, aunt, uncle, cousin, grandparent, or a member~~  
39 ~~of the victim’s household who has developed a family~~  
40 ~~relationship with the victim.~~

~~(2) The person's criminal record does not indicate that diversion has been terminated, or probation or parole has been revoked, without thereafter being completed within the previous 10 years.~~

~~(3) The person has not been referred for counseling or other services pursuant to this chapter prior to the commission of the present alleged offense.~~

~~(4) The person has no prior conviction for any felony sexual offense or any offense in which a minor is a victim of sexual abuse and has no conviction for any felony offense involving violence against another person during the previous 10 years in which the suspected person remained free of prison custody.~~

~~(b) The prosecuting attorney may impose additional relevant criteria for determining whether to refer the suspected person under this chapter.~~

SEC. 5. Section 1203.066 of the Penal Code is amended to read:

1203.066. (a) Notwithstanding Section 1203 or any other law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken pursuant to Section 1385 for, any of the following persons:

(1) A person who is convicted of violating Section 288 or 288.5 when the act is committed by the use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(2) A person who caused bodily injury on the child victim in committing a violation of Section 288 or 288.5.

(3) A person who is convicted of a violation of Section 288 or 288.5 and who was a stranger to the child victim or befriended the child victim for the purpose of committing an act in violation of Section 288 or 288.5, unless the defendant honestly and reasonably believed the victim was 14 years of age or older.

(4) A person who used a weapon during the commission of a violation of Section 288 or 288.5.

(5) A person who is convicted of committing a violation of Section 288 or 288.5 and who has been previously convicted of a violation of Section 261, 262, 264.1, 266, 266c, 267, 285, 286, 288, 288.5, 288a, or 289, or of assaulting another person with

1 intent to commit a crime specified in this paragraph in violation  
2 of Section 220, or who has been previously convicted in another  
3 state of an offense which, if committed or attempted in this state,  
4 would constitute an offense enumerated in this paragraph.

5 (6) A person who violated Section 288 or 288.5 while  
6 kidnapping the child victim in violation of Section 207, 209, or  
7 209.5.

8 (7) A person who is convicted of committing a violation of  
9 Section 288 or 288.5 against more than one victim.

10 (8) A person who, in violating Section 288 or 288.5, has  
11 substantial sexual conduct with a victim who is under 14 years of  
12 age.

13 (9) A person who, in violating Section 288 or 288.5, used  
14 obscene matter, as defined in Section 311, or matter, as defined  
15 in Section 311, depicting sexual conduct, as defined in Section  
16 311.3.

17 (b) “Substantial sexual conduct” means penetration of the  
18 vagina or rectum of either the victim or the offender by the penis  
19 of the other or by any foreign object, oral copulation, or  
20 masturbation of either the victim or the offender.

21 (c) ~~Paragraphs (7), (8), and (9) of subdivision (a) shall not~~  
22 ~~apply when Probation shall not be granted to, nor shall the~~  
23 ~~execution or imposition of sentence be suspended for, any person~~  
24 ~~who is convicted of violating Section 288 or 288.5, unless the~~  
25 ~~court makes all of the following findings:~~

26 (1) ~~The defendant is the victim’s natural parent, adoptive~~  
27 ~~parent, stepparent, relative, or is a member of the victim’s~~  
28 ~~household who has lived in the victim’s household~~ *has not been*  
29 *found ineligible under subdivision (a).*

30 (2) A grant of probation to the defendant is in the best interest  
31 of the child.

32 (3) Rehabilitation of the defendant is feasible, the defendant is  
33 amenable to undergoing treatment, and the defendant is placed in  
34 a recognized treatment program designed to deal with child  
35 molestation immediately after the grant of probation or the  
36 suspension of execution or imposition of sentence.

37 (4) The defendant is removed from the household of the victim  
38 until the court determines that the best interests of the victim  
39 would be served by returning the defendant to the household of  
40 the victim. While removed from the household, the court shall

1 prohibit contact by the defendant with the victim, except the  
2 court may permit the supervised contact, upon the request of the  
3 director of the court ordered supervised treatment program, and  
4 with the agreement of the victim and the victim's parent or legal  
5 guardian, other than the defendant. As used in this paragraph,  
6 "contact with the victim" includes all physical contact, being in  
7 the presence of the victim, communication by any means, any  
8 communication by a third party acting on behalf of the defendant,  
9 and any gifts.

10 (5) There is no threat of physical harm to the child victim if  
11 probation is granted. The court upon making its findings pursuant  
12 to this subdivision is not precluded from sentencing the  
13 defendant to jail or prison, but retains the discretion not to do so.  
14 The court shall state its reasons on the record for whatever  
15 sentence it imposes on the defendant.

16 The court shall order the psychiatrist or psychologist who is  
17 appointed pursuant to Section 288.1 to include a consideration of  
18 the factors specified in paragraphs (2), (3), and (4) in making his  
19 or her report to the court.

20 (d) The existence of any fact that would make a person  
21 ineligible for probation under subdivision (a) shall be alleged in  
22 the accusatory pleading and either admitted by the defendant in  
23 open court or found to be true by the jury trying the issue of guilt  
24 or by the court where guilt is established by plea of guilty or nolo  
25 contendere or by trial by the court sitting without a jury.

26 (e) As used in this section ~~and in Section 1000.12~~, the  
27 following terms apply:

28 (1) "Recognized treatment program" means a program with  
29 substantial expertise in the treatment of children who are victims  
30 of sexual abuse, their families, and offenders, that demonstrates  
31 to the court all of the following:

32 (A) An integrated program of treatment and assistance to  
33 victims and their families.

34 (B) A treatment regimen designed to specifically address the  
35 offense.

36 (C) The ability to serve indigent clients.

37 (2) "Integrated program of treatment and assistance to victims  
38 and their families" means that the program provides all of the  
39 following:



1 (A) A full range of services necessary to the recovery of the  
2 victim and any nonoffending members of the victim's family,  
3 including individual, group, and family counseling as necessary.

4 (B) Interaction with the courts, social services, probation, the  
5 district attorney, and other government agencies to ensure  
6 appropriate help to the victim's family.

7 (C) Appropriate supervision and treatment, as required by law,  
8 for the offender.

9 (f) For purposes of this section ~~and Section 1000.12~~, a  
10 program that provides treatment only to offenders and does not  
11 provide an integrated program of treatment and assistance to  
12 victims and their families is not a recognized treatment program.

13 SEC. 6. No reimbursement is required by this act pursuant to  
14 Section 6 of Article XIII B of the California Constitution because  
15 the only costs that may be incurred by a local agency or school  
16 district will be incurred because this act creates a new crime or  
17 infraction, eliminates a crime or infraction, or changes the  
18 penalty for a crime or infraction, within the meaning of Section  
19 17556 of the Government Code, or changes the definition of a  
20 crime within the meaning of Section 6 of Article XIII B of the  
21 California Constitution.